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IN THE

Supreme Court of the United States

October Term, 1963

No. 912

NELLO L. TEER COMPANY and
UNITED STATES FIDELITY &
GUARANTY COMPANY,

Petitioners,

vs.

HOLLYWOOD GOLF ESTATES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on November 1, 1963.

CITATIONS TO OPINION BELOW

The Findings of Fact and Conclusions of Law and the Final Judgment of the District Court is unreported, but is presented in the Record hereto. (R-121, 133). The opinion of the Circuit Court of Appeals (R-944) presented in the Appendix hereto, (A), is reported at 324 F. 2d 669.

JURISDICTION

The judgment of the Circuit Court of Appeals (R-944) was entered on November 1, 1963 (Appendix C). A timely Petition for Rehearing (Appendix B) filed on November 22, 1963 (R-954) was denied on December 16, 1963 (R-971). The jurisdiction of this Court is invoked under 28 USC, Section 1254 (1).

QUESTION PRESENTED

Whether in a diversity action arising under Florida law a decree or judgment for rescission should follow as a matter of law where there is an uncontroverted finding of fact by the Trial Court as to a material issue of fact which is diametrically opposed to an uncontroverted assumption of that fact, as expressed by parties to a written contract.

CASES INVOLVED

The cases involved are Erie Railroad vs. Tompkins, 304 U.S. 64, 58 S. Ct. 817, Forsyth vs. Hammond, 166 U. S. 506, 17 S. Ct. 665, Langley vs. Irons Land & Development Co. (Fla. 1927) 114 So. 765, Peace River Phosphate Mining Company vs. Thomas A. Green, Inc., (Fla. 1931) 135 So. 8[illegible].

STATEMENT OF THE CASE

Nello L. Teer Company (TEER), a Delaware corporation, contracted in writing to fill by dredging certain land at Hollywood, Florida, for Hollywood Golf Estates, Inc. (ESTATES), a Florida corporation. United States

Fidelity and Guaranty Co. (U.S.F. & G.), a Maryland corporation was TEER'S Surety.

The contract provided for a unit price of forty-five (45) cents per cubic yard of fill, based upon the assumption written into the contract that the contractor in dredging would encounter 50% "hard digging" and 50% "easy digging". ("Hard digging" was defined in writing by the contract to mean wherever hard rock was encountered, all other digging was to be regarded as "easy digging".)

If TEER encountered less than 50% "hard digging", certain reductions in the unit price were to be made, but no provision was made by the parties for the possibility that there would be more than 50% "hard digging." (R-945)

As it developed, all of the digging was hard, and was found so to be by both Courts below (R-128, 946).

TEER ceased operations when it developed that all of the digging was hard, and not 50% hard and 50% easy, as originally assumed by the parties. TEER then instituted an action in the United States District Court for rescission of the contract, predicated among other things, upon a mutual mistake of a material fact, i. e., the nature of the subsoil to be dredged.

The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a citizen of Delaware, and the defendant a citizen of Florida, and the fact that the amount in controversy exceeded Ten Thousand Dollars ($10,000.00).

ESTATES answered and denied TEER'S allegations of mutual mistake of fact. It then counterclaimed for damages based upon a claim of breach of contract, and joined TEER'S surety, U.S.F. & G., a citizen of Maryland. The matter was tried before the District Court without a jury, and at the conclusion of all the evidence, the Court found, among other things:

> "16. All of the material encountered in place by TEER in its dredging was 'hard rock.'" (R-128) (Emphasis supplied)

Notwithstanding this **finding**, the District Court held there was no mutual mistake, denied rescission and awarded damages to ESTATES for breach of the contract by TEER in the amount of $170,461.20 (R-134). Additional damages for attorneys fees in the amount of $25,000.00 were assessed against the Surety, U.S.F. & G. (R-153).

The Circuit Court of Appeals reversed the award of damages and attorneys fees and granted a new trial, on those issues only, upon its determination that the proper elements of proof of damages before the District Court had been lacking (R-952). However, the Circuit Court affirmed the judgment of liability, notwithstanding that the Court first acknowledged that "**no** provision was made by the parties for the possibility that there would be more than 50% hard digging." (Emphasis by the Circuit Court) (R-945)

The effect of the decision is that TEER and its surety, U.S.F. & G., will be required to respond in damages for breach of performance of the contract notwith-

standing the mutual error by both parties as to material fact, i.e., the conditions of the subsoil upon which the unit price is predicated, which condition both parties expressly assumed as a condition precedent to the contract would not exceed 50% hard rock (R-945), but which in truth and fact, as found by both Courts below (R-128, 946), was 100% hard rock.

REASONS FOR GRANTING THE WRIT

The decisions of the Court below in the instant case and the decisions of the Supreme Court of Florida in the case of **Langley** vs. **Irons Land & Development Co.** (Fla. 1927), 114 So. 769, and **Peace River Phosphate Mining Company** vs. **Thomas A. Green, Inc.**, Fla. 1931, 135 So. 828, are in direct conflict.

In **Langley**, the Florida Supreme Court, quoting from 9 Corpus Juris 1167, Sec. 18, held the law of Florida to be:

> "Where a contract in writing is executed by only one of the parties, under a mistake as to fact which is of the essence of the contract, the mistake constitutes a ground for a court of equity to rescind and cancel the apparent contract as written and to place the parties in status quo, but it does not constitute a ground for reformation . . ."

[The Circuit Court has, in effect, in the instant case, granted reformation.]

And, quoting from **1 Black on Rescission and Cancellation**, P. 385, Sec. 140:

> "Mistake as to Identity of Subject Matter. — Equity will grant relief, by way of rescission or cancellation, from a contract or conveyance based upon a substantial misunderstanding of the parties as to the subject matter of the contract, though the mistake was entirely innocent on both sides and there was no fraud or misrepresentation."

And, further, quoting from **4 Ruling Case Law**, P. 508:

> "The jurisdiction of equity to decree the cancellation of an instrument because at the time of its execution the parties, or even one of them, labored under a mistake of fact, is well recognized; and the rule is the same whether the instrument relates to an executory agreement, or one that has been executed."

In **Peace River**, the Supreme Court of Florida stated:

> "The jurisdiction of equity to decree the cancellation of an instrument because at the time of its execution the parties, or even one of them labored under a mistake of fact is well recognized . . ."

This Court heretofore stated in **Forsyth vs. Hammond**, 166 U.S. 506:

> "The determination of the State authorities

should be accepted as authoritative and controlling."

And in **Erie Railroad Co. vs. Tompkins**, it stated:

> "[T]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its legislature or of its Supreme Court) should utter the last word."

To ignore the cited decisions of the Supreme Court of Florida in the light of the express finding by both the District Court and the Circuit Court, is a violation by the Federal Courts below of the fundamental constitutional rights of the Petitioners. Especially is this true when one compares the **assumed** facts of the soil condition:

> "The unit price . . . is based upon the assumption that [TEER] will encounter 50% 'hard' (rock) . . ."

to the District Court's finding of the **actual** facts:

> "**All** of the material . . . was 'hard rock' ".

The violent clash of the **assumed** and the **actual** clearly illustrates that under Florida law, the District Court was required to grant rescission. The interest of justice requires that the judgment be vacated, that the cause be remanded for the enforcement by the Courts of the applicable principles of Florida law, and a judgment for rescission be entered.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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and
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Durham, North Carolina
Attorneys for Petitioners

By _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed this _____ day of March, 1964 to BROAD & CASSEL, 420 Lincoln Road, Miami Beach 39, Florida, and to L. J. CUSHMAN, 706 Ainsley Building, Miami 32, Florida, Attorneys for Respondent.

_____
Attorney for Petitioner

APPENDIX A

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 20301

NELLO L. TEER COMPANY and UNITED STATES FIDELITY & GUARANTY COMPANY,

Appellants,

versus

HOLLYWOOD GOLF ESTATES, INC.,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(November 1, 1963.)

Before RIVES and JONES, Circuit Judges, and DAWKINS, JR., District Judge.

DAWKINS, JR., District Judge: Nello L. Teer Company (Teer), a Delaware corporation, contracted in writing in December, 1959, to raise the level of certain land at Hollywood, Florida, for Hollywood Golf Estates, Inc. (Estates), a Florida corporation. The fill

for this purpose (a minimum of 1,250,000 cubic yards) was to be dredged from two lakes and a canal adjoining the property.

The contract provided for a unit price of 45 cents per cubic yard of fill, based upon the "assumption" that the contractor in dredging would encounter 50% "hard digging" and 50% "easy digging."[1] If the contractor encountered less than 50% hard digging certain reductions in the unit price were to be made, but no provision was made for the possibility that there would be more than 50% hard digging.

As it developed, all of the digging was "hard." After partial performance, having placed 275,936 cubic yards, Teer ceased operations July 13, 1961, and brought this diversity action for rescission of the contract plus recovery upon *quantum meruit*. It based its claims upon 1) misrepresentations it alleged were made to it by Estates, constituting fraud, that Estates had engaged engineers to take borings of the subsoil to be dredged; that reports of such borings indicated most of the dredging would be "soft digging"; and under no circumstances would the "hard digging" exceed 50%; and 2) alleged mutual mistake of fact as to the nature of the subsoil to be dredged.

Estates answered, denying Teer's charges of fraud and mutual mistake of fact. It then counterclaimed for damages, interest, and attorney fees based upon its

[1] "Hard digging," as defined by the contract, ". . . shall be deemed to mean where hard rock is encountered, all other digging shall be deemed to be 'easy digging.'"

claim that Teer had breached the contract, also impleading Teer's surety, United States Fidelity & Guaranty Company.[2]

There is no need here for detailed analysis of the evidence, some of it hotly disputed, which was presented in the lower court. Upon the whole record, it is sufficient to say that, having seen and heard the witnesses and therefore being in the best position to evaluate their statements, the judge's findings are not clearly erroneous, Rule 52(a), F. R. Civ. P. Resolving the conflicting testimony, and upon substantial evidence, he found that Teer's claims were without merit and that Estates was entitled to recover upon its counterclaim and against United States Fidelity & Guaranty Company. To the extent of his basic findings upon the substantive rights of the parties, we affirm.[3]

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[2] The counterclaim further demanded judgment for the unpaid balance due upon a $50,000 loan Estates had made to Teer. Also, the City of Hollywood, Florida, intervened, but neither of these matters is involved in this appeal.

[3] We here quote the judge's findings in that respect, with which we are in full accord:

"8. At all times prior to and at the time of the execution and delivery of the contract described in Finding #6, TEER and ESTATES were dealing at arms length, and no fiduciary or confidential relation existed at any time between TEER and ESTATES and the respective agents with respect to the making of said contract. Before the contract was executed and delivered, ESTATES and its agents knew nothing about 'easy digging' or 'hard digging' or other problems with regard to dredging and filling operations, and that such matters were things which TEER and its agents must determine for itself.

"10. At all times material to this suit, TEER held itself and its agents out as duly qualified to perform the work required by the contract, and the knowledge concerning such work and any difficulties likely to be encountered during its prosecution, possessed by

On this appeal Teer and United States Fidelity & Guaranty Company abandoned their fraud claim, but reassert that there was mutual error in assuming the digging would be half hard, and half easy, thus vitiating the contract. They also contend that substantial error was committed by the District Court in its method of calculating the damages due to Estates; in awarding attorney fees without a hearing and in excess of the maximum allowed by Florida law; and in imposing costs in addition to those taxed by the Clerk when no motion for review had been filed by appellee within the time fixed by Rule 54(d) F. R. Civ. P.

Having already disposed of appellants' contention as to "mutual error," we now pass to consideration of the remaining points made by them.

TEER and its agents far exceeded any such knowledge possessed by ESTATES and its agents. TEER did not, in the execution of said contract, rely upon any statement of ESTATES and its agents concerning 'easy digging', 'hard digging', or any other difficulties which might be encountered by TEER in carrying out the contract.

"11. Before the contract was executed and delivered, TEER and its agents had an opportunity to obtain full, complete and exact information, and actually made an investigation, concerning the nature of the areas where the dredging was to be performed.

"12. TEER was not induced to enter into the contract because of any false or fraudulent representations, or by concealment of material facts, by ESTATES or its agents.

"13. The contract between TEER and ESTATES was in all respects a valid and subsisting contract.

"14. ESTATES in all respects complied with all of the terms of the contract, and fully performed same insofar as required.

"15. TEER without cause breached the contract by abandoning performance on July 13, 1961, and thereby became liable to ESTATES for all damages sustained by ESTATES as the proximate result of said breach."

First, as to the trial court's method of calculating damages due to Estates, we believe this was error. The Court noted that, after Teer breached the contract, appellee entered into a new contract with Arundel Corporation to complete the dredging and filling required at a unit price of 62.5¢, which was 17.5¢ per cubic yard greater than provided for in the Teer contract. It then multiplied this differential by 974,064 yards, the amount of fill not placed by Teer out of the 1,250,000 it had obligated itself to place, and arrived at a figure of $170,461.20, with 6% interest from July 13, 1961, which the Court found to be due to Estates by Teer and its surety.

Yet, there is no proof in the record as to how much fill, if any, Arundel actually delivered, or whether its price of 62.5¢ per cubic yard was the best obtainable, after diligent efforts to mitigate the damages had been made by Estates. Moreover, whereas the Teer contract showed that Estates actually owned only 72 acres and had a purchase option on 97 more, a total of 169 acres. There was no evidence as to what rights or obligation Estates had as to the remaining 301 acres. Teer was obligated to fill the land up to certain grade posts but there was no evidence as to what that height was to be.

These serious omissions in Estates' proof mean to us that the purely mechanical award of damages in the manner and amount stated was not justified. Merely because the contract recited that 470 acres were to be filled, and that Teer was to be paid for placing a minimum of 1,250,000 yards, does not establish an

estoppel against Teer and its surety in light of the absence of proof we have outlined. It may be that upon another trial appellee can succeed in establishing its actual damages in satisfactory manner, but it has not done so as yet.

We have not found, nor have we been cited to, any Florida jurisprudence squarely in point here, but we are entitled to assume that, in such a situation as this, Florida courts would follow the established rules in common law jurisdictions. As we comprehend these rules, where there has been a breach of contract as in this case, with only partial performance, the contractee first must attempt to mitigate his consequential damages with due diligence and to the best of his ability—and must prove that he has done so. Next, he must prove to a reasonable degree of certainty the amount of such damages, plus any extra expenses necessarily incurred, and any loss of profits caused by the breach. Finally, and over all, except in jurisdictions where punitive damages are allowed, he must do these things with the least burden to the wrongdoer consistent with the idea of fair compensation.

We find these principles plainly enunciated at 25 C.J.S. *Damages*, § 71. (See also at 46 and 75), supported by citations to a wealth of common law jurisprudence:

> "Stated in broad terms, however, the measure of damages is such sum as will compensate the person injured for the loss sustained, with the least burden to the wrongdoer

consistent with the idea of fair compensation, and with the duty upon the person injured to exercise reasonable care to mitigate the injury, according to the opportunities that may fairly be or appear to be within his reach, and the same rule obtains whether the loss is claimed for injury to property, personal injury, or breach of contract. * * *"

To the same effect see Annot. 76 A.L.R. 2d 803; § 9, pp. 830 *et seq.*

A fairly early decision by this Court, *American Surety Co. v. Woods*, 105 Fed. 741 (1901), never overruled or criticized so far as we have ascertained, squarely held that where a construction or similar contract is breached by a contractor after partial performance, the contractee is not entitled automatically to recover the difference between the contract price and the amount which it would have cost to have the work done, unless completion actually is accomplished at a greater cost. While this case involved a Louisiana statute, the Court made it plain that the common law was to the same effect.[4] *Cf. Poinsettia Dairy Products*

[4] "* * * It is argued from this proposition that, if the contractor wrongfully abandons the contract and refuses to do the work he has contracted to do, the employer, in a suit for damages for breach of the contract, may recover the difference between the contract price and the sum which it would have cost the employer to have the work done, although the employer in fact does not have the work done. To apply the principle to this case, the contention is that, as Stewart & McDermott agreed to finish the sewers for sums aggregating $739,500 and then abandoned the work, and as it would have cost the sewerage company $912,099.09 to complete the work, the receiver of the sewerage company is entitled to recover the difference between the contract

v. Wessel Co., 166 So. 306 (Fla. Sup. Ct., 1936) and *Davis v. Stow*, 60 So. 2d 630 (Fla. Sup. Ct., 1952).

We conclude, therefore, that the judgment of the District Court on the question of quantum of damages must be reversed, and the case remanded for a new trial on that aspect. Of course, Teer is entitled to credit for the work it actually performed.

Likewise, it appearing that attorney fees in the sum of $25,000 were allowed to appellee, without hearing

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price and what it would have cost to finish the work, to wit, $172,599.09, though in fact the work was not finished, and no money actually expended to finish it. ***

"*** Can it be said that the employer who has obtained a contract securing services at cheap rates, when the contractor refuses to do the work, has certainly lost the difference between the contract price and the cost of having the work finished, when the employer does not have the work finished? Is this difference a certain gain or profit or value that the employer has lost? His loss would be certain, we think, only in the event he had the work done at a cost greater than the contract price. The contention that the measure of his damages is the difference between the contract price and a greater price which he has never paid must be based on the erroneous theory that the contract is necessarily worth to him the sum above the contract price that it would cost the contractor to finish the work. The fact that the contractor would lose a fixed sum by completing the work does not show that the employer loses that sum by the failure of the contractor to finish it. If the contractor stops the work and the employer does not complete it, it cannot be said he has been damaged what the former would have lost had he not stopped the work. When the contractor breaks his contract he is liable to his employer for the amount the employer is damaged, but it does not follow that he is liable for the amount that the contractor saved by his abandonment of the contract. It is a mistake, we think, to assume that whatever the contractor saved by stopping the work was lost by the employer who does not complete it.

"It seems to us that the conclusion of the court in this case was correct, and that, whatever other damages may have been sustained, it cannot be said, before the work has been completed at a greater cost, that the injured party has sustained damages to the amount of the difference between the contract price and the cost of completing the work. ***"

or proof, and it appearing further that the Florida legislature has limited such fees to a maximum of 12-1 2 per cent of the judgment against a surety, the District Court's award in that respect also is in error. It must be reversed and remanded for proof and further consideration. Fla. Statutes 627.0905, §2; *Stuyvesant Ins. Co. of N. Y. v. Nardelli*, 286 F. 2d 600 (C.A. 5, 1961); *Nelson v. Lewis*, 173 So. 835 (Fla. S. Ct., 1937); *Beasley v. Wolf*, 151 So. 2d 679 (Fla. Dist. Ct. of App., 1963).

Since, upon remand, the trial court may redetermine costs to be taxed, there is no necessity for ruling at this time upon appellants' contention that Rule 54(d), F. R. Civ. P., was violated in taxing costs, or appellee's argument that this matter is not properly before this Court because it was not included in the judgment appealed from.

Costs of this appeal are assessed equally against appellants and appellee.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

APPENDIX B

Filed U.S. Court of Appeals, December 16, 1963

Edward W. Wadsworth, Clerk

[74]

IN THE UNITED STATES COURT OF APPEALS

For The Fifth Circuit

NO. 20301

NELLO L. TEER COMPANY and
UNITED STATES FIDELITY &
GUARANTY COMPANY,

Appellants,

vs.

HOLLYWOOD GOLF ESTATES, INC.,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

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December 16, 1963

ON PETITION FOR REHEARING

Before RIVES and JONES, Circuit Judges, and DAWKINS, JR., District Judge.

PER CURIAM:

The petition for rehearing is DENIED.

APPENDIX C
UNITED STATES COURT OF APPEALS

For The Fifth Circuit

October Term, 1962

No. 20301

D. C. Docket No. 10892 Civil

NELLO L. TEER COMPANY, and
UNITED STATES FIDELITY & GUARANTY COMPANY,

Appellants,

versus

HOLLYWOOD GOLF ESTATES, INC.,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before RIVES and JONES, Circuit Judges, and DAWKINS, JR., District Judge.

JUDGMENT

This cause came on to be heard on the transcript of

the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court on the question of quantum of damages in this cause be, and the same is hereby reversed; and that this cause be, and it is hereby remanded to the said District Court for a trial on that aspect in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellants, Nello L. Teer Company and United States Fidelity & Guaranty Company, be condemned, in solido, to pay one-half of the costs of this cause in this Court; and that the appellee, Hollywood Golf Estates, Inc., be condemned to pay one-half of said costs, for all of which execution may be issued out of the said District Court.

November 1, 1963

Issued as Mandate: January 9, 1964
Court Costs:
Docketing cause, etc . . . $25.00

Office Supreme Court, U.S.
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APR 6 1964
JOHN F. DAVIS, CLERK

IN THE

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No. 912

NELLO L. TEER COMPANY and
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vs.

HOLLYWOOD GOLF ESTATES, INC
Respondent.

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IN THE

Supreme Court of the United States

October Term, 1963

No.

NELLO L. TEER COMPANY, and
UNITED STATES FIDELITY &
GUARANTY COMPANY,

Petitioners,

vs.

HOLLYWOOD GOLF ESTATES, INC.

Respondent.

Respondent, HOLLYWOOD GOLF ESTATES, INC., respectfully suggests and submits that the Petition for Certiorari in the above styled cause should be denied because it is based upon a completely mistaken and erroneous understanding on the part of Petitioners' counsel of the proceedings sought to be reviewed. We have included as part of this Brief a Supplemental Appendix designated thus: (SA:) containing the parts of the record essential to demonstrate the error into which counsel has fallen, and upon which said Petition rests.

STATEMENT OF THE CASE

NELLO L. TEER COMPANY (TEER), a Delaware corporation, entered into a written contract (SA: 1-9) with Hollywood Golf Estates, Inc., a Florida corporation (ESTATES) "To excavate, by hydraulic dredge operation sufficient material so as to place 1,250,000 cubic yards of fill on lands described in said contract. TEER commenced

performance of said contract (SA: 1-9) but after having dredged and deposited 275,936 cubic yards of fill, ceased operations and abandoned further performance of said contract (SA: 1-9) and as Plaintiffs brought suit against ESTATES (Amended Complaint, R: 89-104) to rescind and cancel said contract for fraud and mistake. Defendant, ESTATES, counterclaimed for breach of said contract (SA: 1-9) and joined United States Fidelity & Guaranty Co. (U.S.F. & G.) a Maryland corporation, the surety upon TEER'S performance bond. After a trial (R: 162-932) the court stated findings of fact and conclusions of law (SA: 9-17) upon which judgment (R: 133-136) was entered, from which TEER appealed. The Fifth Circuit Court of Appeals affirmed (Petitioners' Appx. 1-9) said judgment (R: 133-136) upon the issue of liability, and reversed and remanded said cause for a new trial upon damages, and Petitioners seek to review the judgment (Petitioners' Appx. 11-12) upon said Appeal on Certiorari.

ARGUMENT

The Error of Petitioner's Counsel

The error of Petitioners' counsel is this: They construe Paragraph 16 of the Trial Court's Findings of Fact (SA: 13) reading as follows:

> "16. All of the material encountered in place by TEER in its dredging was 'hard rock'."

as a finding in TEER's favor upon its claim or issue of "mutual mistake", which it clearly is not. This **"error"** on the part of Petitioners' counsel is demonstrated on the

record by the court's findings of fact **eight** and **ten** to **fifteen**, both inclusive, (quoted in Footnote 3, to the opinion of the Court of Appeals, Petitioners' Appx. 3-4, also SA: 11-13). Counsel for TEER, recognizing that by those findings of fact the trial judge had, in effect, found against TEER upon its claim or issue of "mutual mistake", filed a MOTION TO AMEND FINDINGS OF FACT AND FOR ADDITIONAL FINDINGS OF FACT (R: 136-143) in Paragraph 18 of which (R: 142) Petitioners' counsel requested the Court to make an "Additional Finding of Fact" reading as follows:

> "That the parties mutually assumed, as evidenced in the contract, that TEER would not encounter in excess of 50% hard digging; however, as found by the Court in its original finding 16, TEER did in fact encounter all hard digging and this mistake of the parties was a material mistake and formed the basis for an action of rescission upon its discovery."

The trial judge **denied** (See Par. (1) and (2) of Order, R: 153) **opposing Counsel's request** to make said "Additional Finding of Fact", and such refusal was the equivalent of a finding against TEER upon that claim or issue:

> **"Failure to find.** The failure to find a particular fact is equivalent to a finding against the party who has the burden of proving such fact. Thus, the failure to find the ultimate fact, or a fact essential to a recovery is deemed a finding against the party having the burden of proof." **35B CJS "Federal Civil Procedure" 421.**

In **Container Patents Corporation v. Stant,** (CCA-7) 143 F.2d, 170, Judge MINTON, later Justice of the Supreme Court, speaking (Text 172) of the effect of the trial court's failure to find a fact upon which the party had the burden of proof, said:

> "But even assuming that this question had been presented to the trial court, the absence of any findings by the court thereon is equivalent to a finding against the defendants, whose burden it was to sustain this proposition."

In **Hall-Essole Co. v. Durkee-Atwood Co.** (Minn.) 35 N.W. 2d 601, the Court (Text 605) stated the rule to be that:

> "The court, by denying defendant's motion for a finding of an account stated and of estoppel in effect found to the contrary".

In **Thompson v. Lee Roy Crawford Produce Co.,** (Texas Sup. Ct.) 233 S.W.2d 295, Justice Brewster said:

> "Hence the refusal of the trial court to make the findings amounted to a finding against respondent's contention and we are not authorized to disturb it."

Petitioners' reasons for granting the Writ, and the authorities cited in support thereof (Petition: pp. 5-7) rest upon the premise that the trial court found as a fact, that the contract (SA: 1-9) was the result of a "mutual mistake" of fact, and therefore, Petitioners' counsel contends and argues, said contract (SA: 1-9) should have

been rescinded and cancelled, and TEER relieved from the obligations thereof. Since the premise for the reasons for granting the Writ is erroneous and non-existent, it follows, we submit, that the Writ should be denied.

The "Unit Price" was Not Based on Any "Assumption".

The controversy out of which this suit arose involved Paragraph **Ten (10) of said contract** (SA: 4-5) which fixed (Par. A., SA: 4) a "unit price of 45c per cubic yard", and then (Paragraphs B thru E, SA: 4-5) provided that certain "deductions from said unit price of 45c per cubic yard", should be made, and finally, Paragraph 10-E (SA: 4-5), provided as follows:

> "E. The above unit price of 45c per cubic yard is based upon the assumption that the CONTRACTOR will encounter 50% 'hard digging' and 50% 'easy digging'; for any portion of the excavation where the CONTRACTOR encounters less than 50% of 'hard digging' the unit price shall be reduced by 1¢ for each 10% reduction of 'hard digging' which has been the basis of unit price. 'Hard digging' shall be deemed to mean where hard rock is encountered, all other digging shall be deemed to be 'easy digging'".

This provision had no relation to fixing "the unit price of 45c per cubic yard", fixed by **Paragraph 10-A**, but merely provided that in the event that TEER "encounters less than 50% hard digging" the unit price shall be reduced to the extent therein provided. When

TEER commenced performance it turned out that there was no "easy digging", so that **Paragraph 10E** never came into operation at all. According to TEER, the contract (SA. 1-9) should read as if it contained this provision:

> "If more than 50% hard digging is encountered, then TEER is relieved of any obligation to continue under the contract, and if TEER does continue, then TEER can recover on a quantum basis for the work performed."

The contract contains no such wording, and such an important and far-reaching provision cannot be supplied by implication from any wording actually contained in the contract. On the other hand, the contract is clear that the purpose of Paragraph 10-E was to provide for a reduction in price in the event there was less than 50% hard digging. Paragraph 10 of the contract is the only provision in the contract relating to compensation. First it provides that ESTATES shall pay TEER "for a minimum of 1,250,000 cubic yards of fill . . . on the following basis:"

> "A. The unit price of 45c per cubic yard."

Then follows four (4) sub-paragraphs, each of which provide for certain "deductions" are as follows:

> (B) 2c cubic yard "because of saving effected in connection with the purchase of dredge." (Par. 10-B).
>
> (C) 4c per cubic yard "until * * * the $50,000.00

loan * * * has been fully repaid." (Par. 10-C)

(D) 2c per cubic yard "if the Contractor is permitted * * * to operate the dredge on a 24-hour day * * *." (Par. 10-D).

(E) "1c for each 10% reduction of 'hard digging' below the 50% of 'hard digging' . . ." (Par. 10-E)

We submit that the clear, unambiguous meaning of Paragraph 10 is that the "basic unit price" to be paid to the Contractor shall be 45c per cubic yard, subject to certain specific "deductions", one of which is to be allowed "for any portion of the excavation where the contractor encounters less than 50% 'hard digging'". If the contractor does not encounter "less than 50% hard digging" in "any portion of the excavation," then the OWNER is entitled to no deduction under Paragraph 10-E.

Paragraph 10-E is all in one sentence. The beginning of the sentence relates to unit price of 45c per cubic yard, and the remainder of the sentence relates to a reduction from that 45c per cubic yard in the event there is less than 50% of hard digging.

The meaning which we have ascribed to Paragraph 10-E is fortified by the admitted fact that Siegal at all times insisted to TEER that unless they could agree on a firm, fixed price, he could not go forward with the contract. TEER himself (Teer R. 234) said:

"There was an equal discussion about the final

> land cost and Mr. Siegel kept repeating that he had to know the cost of the land, what it was going to cost him, or else he could not go forward and that if it would cost any more than the price we would agree on, that the project could not go forward."

Mailman (R. 657) said:

> "* * * Mr. Siegel said (i.e., to Teer) that as far as he was concerned he had to have a definite price for the fill put in place on the land so that he could determine for himself whether or not he and a group of his people would buy the land from me."

Siegel (R. 745) said:

> "And I said to him (Teer) that I did not want to know anything about presumptions or assumptions. I have got to have an all inclusive maximum price and that is the only way I can get into a contract."

Siegel at all times stated emphatically, that he must have a firm, fixed maximum price for the fill in place on the land (R. 741-742; 744-745; 772-773) and no witness has testified to the contrary.

The uncontradicted testimony of ABRAHAM L. MAILMAN, H. J. SIEGEL and STANLEY BECKERMAN was that during the conference in Beckerman's office on December 22, 1959, the parties had been discussing the price per cubic yard which was to be paid for

the fill. Siegel was insisting on a price of 41c per cubic yard (R. 808), and Teer wanted five cents more (R. 674) or 46c cubic yard. The parties seemed to be unable to agree, and Mr. Mailman took Teer off in a corner (R. 674-676) and suggested that Teer agree upon a price of 45c per cubic yard, with the further stipulation that if Teer should encounter less than 50% "hard digging", that there should be a reduction in proportion to the "easy digging" encountered, and Teer agreed to that formula. (R. 684-676). Siegel said (R. 752-753) that he stated:

> "If we are going to come to any conclusion that we are going to wind up with a fixed price at hard digging, and if there is going to be any softer digging, I want to get a direct benefit from that."

Beckerman said (R. 809-810) that when Mailman took Teer to another part of the room and conferred privately with him that it was then agreed that there should be a reduction of 1c per cubic yard for each 10% less than 50% hard digging encountered, and that was the provision inserted in the contract.

In **City of Tampa v. City of Port Tampa,** (Fla. App. 2) 127 So.2d 119, the City of Port Tampa had sold its entire water system to the City of Tampa, by a contract, Paragraph 8 of which read as follows:

> "8. The City of Tampa agrees that it will extend the water mains, laterals and water pipes in the City of Port Tampa whenever necessary to furnish water to the inhabitants of said City."

The City of Tampa contended that although Paragraph 8 bound it to "extend the water mains, laterals and water pipes" it was not required to do so without charge. The Court held that since Paragraph 8 did not provide for any charge, the City of Tampa could not make any charge. Judge Shannon, speaking for the Court, said:

> "The appellant, City of Tampa, sets out the question as follows:
>
> "May the Appellant, City of Tampa, charge the inhabitants of the City of Port Tampa, Appellee, for the extension of water mains, laterals and water pipes where the paragraph in a contract between the City of Tampa and the City of Port Tampa as to such services is silent concerning compensation, and where the intent of the parties at the time of the execution of the subject contract cannot be ascertained?
>
> "We think that the contract is not ambiguous and the fact that provision for payment was omitted from the contract sufficiently demonstrates, in itself, that the City of Tampa had no intention of charging the inhabitants of the City of Port Tampa at all.
>
> "In construing the contract between two cities in which this item is left out, we conclude that it was intentionally left out by the tacit understanding of the parties. Such action and acquiescence therein will supply the necessary proof that this provision was not placed in the contract advisedly.

"Viewed in this light we hold that the contract is not ambiguous. In 12 Am. Jur., Contracts, Sec. 228, it is stated that:

"'Interpretation of an agreement does not include its modification or the creation of a new or different one. A court is not at liberty to revise an agreement while professing to construe it. Nor does it have the right to make a contract for the parties . . . .'"

Azalea Park Utilities, Inc. v. Knox Florida Development Corp., (Fla. App. 2) 127 S.2d 121, was a similar case. A sub-divider had entered into a contract with the utility company to extend its water and sewer lines into new subdivisions, which:

". . . specifically provided that there would be no charge for tapping in to the defendant's water lines but the contract was silent in regard to a tap-in charge for the sewer lines."

The utility company "served notice that a $200 tap-in charge would be assessed for connecting each house to the company's sewage lines." The trial court held since the contract was silent in regard to a tap-in charge for sewer lines, no such charge could be made. The court affirmed that decree saying:

"The contract of March, 1956, is quite detailed, containing provisions for monthly sewer charges; estimates of meter boxes; deposits by customers; etc. In view of the other detailed provisions in

this writing, it is important to note that the contract expressly excludes water tap-in charges and yet makes no mention whatsoever of sewer tap-in charges. We do not find the contract ambiguous and therefore we must determine the intent of the parties from the writing itself. As Justice Thornal stated in Gendzier v. Bielecki, Fla. 97 So.2d 604, 608:

" . . . The rule is well established in this state as well as everywhere else that when competent parties reduce their engagements to writing in terms that create a legal obligation without any uncertainty as to the object or extent of the engagement as between them, it is conclusively presumed that the whole engagement and the extent and manner of their undertaking is contained in the writing. The writing itself is the evidence of what they meant or intended by signing it. The test of the meaning and intention of the parties is the content of the written document. * * *"

"The appellant argues that since the agreement is silent as to sewer tap-in charges, the company can now charge for this service. To so hold, it would be necessary for this court to read into the contract a provision which it does not contain. When the writing is silent on the point in controversy, courts are reluctant to add terms by implication, for there is a clear danger that, in so doing, the court will remake the contract. Pierce v. Isaac, 134 Fla. 666, 184 So. 509".

We submit that the cases we have cited control the case at bar. In the City of Tampa case, the Court held since the contract was silent as to any charge for extending "water mains, laterals and water pipes", no charge could be made. In the Azalea case, since the contract was silent about any "tap-in charge" for sewage lines, no such charge could be made. The court said:

> "Adding this provision now would amount to judicial reformation of an unambiguous contract."

In the case at bar, Paragraph 10 contains four (4) separate stipulations (Subparagraphs B-E) providing for "deductions" from the basic unit price of 45c per cubic yard, one of which (Paragraph 10-E) was to become effective if "in any portion of the excavation" the CONTRACTOR should encounter "less than 50% of hard digging," but said contract contains NO PROVISION relieving the contractor from the obligation of the contract in the event it should encounter "MORE THAN 50% of the hard digging". We submit that "adding this provision now would amount to judicial reformation of an unambiguous contract", not permitted under the law.

In **Moon v. Wilson**, 100 Fla. 791, 130 So. 25, the court said:

> "It is a well settled rule of law that if one contracts absolutely and unqualifiedly to do something possible to be done, he must make his promise good unless his performance be rendered actually impossible by the act of God, the law or the other party. If unexpected impediments lie

> in the way of the performance of the contract and a loss must result, it leaves the loss wher the agreement of the parties has put it. The parties must themselves guard against unexpected contingencies by express exceptions in their contracts. If they have made no provision for a dispensation, the law gives none; it will not insert for the benefit of one or the other of the parties by construction, an exception which they failed, either by design or neglect, to insert in their agreement. A contract fairly made will not be annulled by an interpolation of something which the parties themselves have not stipulated. See Milske v. Steiner Mantel Co., 103 Md. 235, 63A. 471, 115 Am. St. Rep. 354, 5 L.R.A. (NS) 1105 and notes."

TEER cannot have the court supply for him these words which were **not** in the agreement: "if the 'hard digging' exceeds 50%, TEER is released from obligation and can recover from ESTATES on a quantum meruit." This clause, if it existed, would have an overwhelming effect on the relationship of the parties. Had this clause been the intent of the parties, it certainly would have been contained in the written contract. It cannot now be supplied by the court by implication.

In **Stemmler v. Moon Jewelry Company**, (Fla. App.) 139 So.2d 150, plaintiff lessor sought a declaratory judgment that defendant lessee had impliedly covenanted to operate its business during the lease term and was therefore liable for additional rent based on gross receipts as if defendant lessee had remained in possession. Judg-

ment for defendant lessee was affirmed, the court saying: (Text 153)

> "The logical and rational approach in interpreting an agreement between parties is to read what is written—not attempt to read into the written instrument what might have been left out."
>
> * * *
>
> "And Judge Shannon quoting American Jurisprudence in Azalea Park Utilities, Inc. laid down the rule we find applicable to the instant lease:
>
> "'The absence of a provision from a contract is evidence of an intention to exclude it rather than of an intention to include it.'"
>
> "The writing itself being silent as to any affirmative covenant made by defendant to operate a jewelry business on the leased premises and containing an express covenant by plaintiff permitting defendant during the period of the lease to at any time move any or all of the fixtures, we find to be unambiguous and complete and to negate any theory of an implied covenant on the part of defendant to operate its business during the entire period of the lease."

Enid Corporation v. Mills, (Fla. App. 3) 101 So.2d, 906, was an action to enforce a lien for the construction of streets in defendant's subdivision. Defendant filed a counterclaim for improper construction. Decree for plaintiff was affirmed, the court (Text 908) saying:

"Each party knew of the character of the subsoil, both at the time of entering into the work and at the time the work was being done; each was fully aware of the possibility that roads built upon such soil might settle slightly."

* * *

"Soon after the roads were completed, there was a slight settlement in some places; so that portions of the roads were under the 5 foot elevation. The plaintiffs refused to raise the portions which were under five feet as requested by the defendants. With this factual background established, the appellants present the question:

"'Did the court err in finding as a matter of law that the contractor (plaintiffs) did not have to bear the expense of bringing the roads up to the required elevation, **where the contractor had no provision in his contract for such possibility notwithstanding his knowledge of the condition of the land?'**" (Emphasis ours)

* * *

"An unexpected impediment to the performance of a contract will not relieve a party from his contractual obligations, unless his performance is rendered impossible by an act of God. See Moon v. Wilson, 100 Fla. 791, 130 So. 25. It is apparent from the statement of the facts **in the instant case that we are not dealing with an unexpected condition.**"

The contract (SA: 1-9) cannot, we submit, be construed as TEER contends, and the Opinion and Judgment of the Circuit Court of Appeals was correct. The Petition for Certiorari should be denied.

CONCLUSION

We respectfully suggest and submit that none of the reasons for granting Certiorari suggested by Rule 19 of the Revised Rules of the Supreme Court of the United States, nor any other reasons sufficient to invoke this Court's sound judicial discretion to grant the Writ prayed for exist in the case at bar, and therefore Certiorari should be denied.

Respectfully submitted,

BROAD & CASSEL and
LEWIS HORWITZ and
L. J. CUSHMAN
500 Ainsley Building
Miami, Florida
Attorneys for Respondent.

SUPPLEMENTAL APPENDIX

AGREEMENT

THIS AGREEMENT, Made and entered into this 23rd day of December, 1959, by and between **HOLLYWOOD GOLF ESTATES, INC.**, a Florida corporation, hereinafter designated as **OWNER**, and **NELLO L. TEER COMPANY**, a Delaware corporation, hereinafter designated as **CONTRACTOR**.

WITNESSETH

In consideration of the promises, covenants and undertakings hereinafter set forth, the parties hereto agree as follows:

1. **CONTRACTOR** agrees to excavate by hydraulic dredge operation sufficient material so as to place 1,250,000 cubic yards of fill on property owned or under option to the **OWNER**, which said property may be generally described as a parcel of land consisting of approximately 470 acres located in Broward County, Florida, bounded by Washington Street on the North, Intra-Coastal Waterway on the East, Hallandale Beach Boulevard on the South, DeSoto Canal and 14th Avenue on the West.

2. **CONTRACTOR** agrees to furnish all necessary equipment, parts, supplies and labor to satisfactorily perform this work, placing the excavated material on that part of the land of the **OWNER** as designated by the **OWNER** and to an elevation designated by the **OWNER**. **CONTRACTOR** shall spread the fill to rough grade, which

shall be deemed to mean a maximum—minimum difference of 6 inches above or below the grade established by **OWNER**. **CONTRACTOR** shall maintain grade stakes which have been placed by **OWNER** and shall be responsible for replacement if destroyed.

3. Subject to direction of the **OWNER**, the **CONTRACTOR** shall engage in the excavation operation by removing material from the North Lake and the South Lake pursuant to the permit and the directions of the City of Hollywood, and by removing material from the Intra-Coastal Waterway pursuant to the terms and conditions of permits (59-360) dated October 13, 1959, from the Corps of Engineers, U. S. Army, Office of the District Engineer, Jacksonville District, Jacksonville, Florida. If directed by **OWNER**, the **CONTRACTOR** will engage in dredging operations and excavate in and about the area of the over-all tract of land hereinabove described.

4. Wherever existing mangrove, roots, or growth can remain in place it will serve as a mat and the fill will be deposited thereon.

5. The **CONTRACTOR** shall provide and pay for all permits, occupational licenses and other fees in connection with this Agreement, and the **CONTRACTOR** shall provide, at **CONTRACTOR'S** expense, public liability insurance in minimum limits of $300,000.00 — $600,000.00, property damage in minimum limits of $100,000.00 and required workmen's compensation.

6. The **CONTRACTOR** agrees to commence operations on February 15, 1960, or as soon thereafter as directed by the **OWNER** and the **CONTRACTOR** agrees

to complete the delivery of 1,250,000 cubic yards of fill within six (6) months after February 15, 1960, or within six (6) months after the date on which the **OWNER** directs the **CONTRACTOR** to commence operations.

7. The **CONTRACTOR** agrees to supply a surety bond in favor of the **OWNER** guaranteeing performance by the **CONTRACTOR** of all of the terms and conditions of this Agreement and guaranteeing payment by **CONTRACTOR** to all persons supplying labor, material, equipment and supplies for this job and guaranteeing payment by the **CONTRACTOR** of all workmen's compensation and unemployment compensation taxes that may be required to be paid by the **CONTRACTOR**, said surety bond to be written by a company satisfactory to the **OWNER** and to be in the principal amount of $500,000.00, the premium for such bond to be paid for by the **CONTRACTOR**. If the owner decides to arrange for this bond and pay the premium, then the **CONTRACTOR** shall credit the **OWNER** with $5,000.00 on the first amount due from **OWNER** to **CONTRACTOR** hereunder.

8. Simultaneously with the execution of this Agreement the **OWNER** agrees to lend to the **CONTRACTOR** the sum of $50,000.00, which sum is to be used by the **CONTRACTOR** in connection with the purchase and transportation of the hydraulic dredge, and said sum of $50,000.00 shall be repaid by the **CONTRACTOR** to the **OWNER**, without interest in the manner set forth hereinafter.

9. Within thirty (30) days after the execution of this Agreement, the **OWNER** agrees to arrange for a bank loan to be made to the **CONTRACTOR** in the

amount of $25,000.00 on terms and conditions satisfactory to the **CONTRACTOR**, the proceeds of which said loan shall be used by the **CONTRACTOR** for working capital in connection with the work involved in this Agreement.

10. The **OWNER** agrees to pay the **CONTRACTOR** for a minimum of 1,250,000 cubic yards of fill **as the same is measured in place on the land of the OWNER, as hereinafter specifically defined,** on the following basis:

A. The unit price of 45¢ per cubic yard.

B. There shall be deducted from said unit price of 45¢ per cubic yard, the sum of 2¢ per cubic yard on the first 1,250,000 cubic yards of fill (which is a credit due **OWNER** because of saving effected in connection with purchase of dredge by **CONTRACTOR**).

C. There shall also be deducted from said unit price of 45¢ per cubic yard the sum of 4¢ per cubic yard until such time as the $50,000.00 loan made by the **OWNER** to the **CONTRACTOR** has been fully repaid.

D. For all cubic yards of fill material excavated by the **CONTRACTOR** and deposited on the land of the **OWNER** and measured in accordance with the provisions hereinafter provided, if the **CONTRACTOR** is permitted by governmental authorities to operate the dredge on a 24-hour day, there shall be deducted from the unit price of 45¢ per cubic yard the additional sum of 2¢ per cubic yard.

E. The above unit price of 45¢ per cubic yard is based upon the assumption that the **CONTRACTOR** will

encounter 50% "hard digging" and 50% "easy digging"; for any portion of the excavation where the **CONTRACTOR** encounters less than 50% of "hard digging" the unit price shall be reduced by 1¢ for each 10% reduction of "hard digging" below the 50% of "hard digging" which has been the basis of unit price. "Hard digging" shall be deemed to mean where hard rock is encountered, all other digging shall be deemed to be "easy digging".

11. On whatever portion of the land the **OWNER** directs the **CONTRACTOR** to deposit fill, the **OWNER** will furnish the **CONTRACTOR** with grid elevations at 50 foot centers showing the existing ground elevation of land, which said work and drawings will be made by M. E. Berry, of Hollywood, Florida, Registered State of Florida Surveyor; and as the fill is deposited by the **CONTRACTOR** on said land and rough spread in accordance with the terms and conditions hereinabove set forth, said **M. E. Berry, Registered Surveyor**, will prepare the grid patterns to show the elevation of the land as filled and **will make the computation which will determine the number of cubic yards of fill in place (without regard to subsidence, as subsidence has been allowed for in contract price), for which the OWNER shall then pay the CONTRACTOR.**

Parties agree that the measurements, both before and after, and the computations made by M. E. Berry, Registered Surveyor, shall be final, and shall be binding upon the parties hereto; both parties waive any and all rights to arbitrate or to appeal to any court in connection with the measurements and computations of said M. E. Berry.

12. The **OWNER** shall pay to the **CONTRACTOR** the sum of money due the **CONTRACTOR** in accordance with the price formula hereinabove set forth, on the 22nd day of each month for all work performed up to and including the 15th day of each month; and shall also make payment on the 7th day of each month for all work performed during the preceding month subsequent to the 15th day of said month; payments to be made on certificate of M. E. Berry.

13. In the event the **OWNER** instructs the **CONTRACTOR** to excavate more than 250,000 cubic yards of fill from the North Lake, then some adjustment shall be mutually worked out whereby the **OWNER** will pay the **CONTRACTOR** for the extra throw involved in the excavation of more than 250,000 cubic yards of fill from the North Lake.

14. The parties specifically agree that the volume to be paid for by the **OWNER** shall be calculated by M. E. Berry in the manner hereinabove provided for and shall be the measurements resulting from the 50 foot grid patterns taken before and after the placing of the material on the property by the **OWNER**.

15. This Agreement shall be binding upon the parties hereto, their respective successors and assigns.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed by their respective duly authorized officers and their respective corporate seals affixed the day and year first above written.

Witnesses: HOLLYWOOD GOLF ESTATES, INC.

S *ILLEGIBLE* By S *ILLEGIBLE*

ATTEST: S *ILLEGIBLE*

Secretary Seal

NELLO L. TEER COMPANY

S *ILLEGIBLE* By S *ILLEGIBLE*

Seal

S *ILLEGIBLE* ATTEST: S *ILLEGIBLE*

Secretary

Hollywood Golf Estates, Inc.
c/o Stanley M. Beckerman
Attorney at Law
Hollywood, Inc. Building
P. O. Box 160
Hollywood, Florida

Gentlemen:

In reference to Mr. Beckerman's letter of December 24, 1959, concerning our proposed Agreement under date of December 23, 1959, three (3) copies of the said Agreement being enclosed herein and fully executed by us, this is to advise as follows:

1. In reference to the proposed Agreement, it is our understanding that Paragraph 4 on Page 2 of the

Agreement does not make us in anywise responsible or liable for any clearing or grubbing, and that we have no responsibility in connection with any clearing and grubbing and, in particular, the removing of any mangrove, roots or growth in the areas owned by you and upon which or in which we will pump fill material. Of course, we understand that we are to pump the fill material onto existing mangrove, roots or growth where possible so that the same can serve as a mat for the fill to be deposited.

2. In connection with **Paragraph 16-E**, we find that there is no method or manner in which "hard digging" or "hard rock" is actually defined or determined, and we further find that the contractor does not provide for a method of determining "hard rock" or for a method of measuring the same, therefore, we assume that "hard digging" will be determined by test borings prior to the fill material being excavated, and that **it will be mutually agreed prior to dredging any particular fill material as to whether the same is "hard digging" or "easy digging", so as to eliminate any controversy or difficulties in connection with payments arising out of "easy digging" or "hard digging".**

Other than for the clarification of the two above specific points, we find the contract in accordance with the discussion held in Mr. Beckerman's office on December 22, 1959, and have executed the same in accordance with the discussion and in accordance with our understandings as set forth hereinabove in our Paragraphs 1 and 2.

Please acknowledge this letter as set forth herein-

below and return a copy of same, along with our copy of the fully executed contract, so that both can become part of our records concerning the working agreement arrived at between the parties. Otherwise, please advise, so that the within points can be clarified prior to the final conclusion of the Agreement.

Yours very truly,

NELLO L. TEER COMPANY

By: S Nello L. Teer, Jr.
President

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause came on for trial upon:

the amended complaint of the Plaintiff, Nello L. Teer Company, against Defendant, Hollywood Golf Estates, Inc.; and

the counterclaim of Hollywood Golf Estates, Inc., against Nello L. Teer Co., Plaintiff-Counter-defendant; and

the crossclaim of Hollywood Golf Estates, Inc., against the United States Fidelity and Guaranty Company, Defendant;

all in case No. 10,892; and further, upon:

the complaint of Plaintiff, City of Hollywood,

against Nello L. Teer Co., and the United States Fidelity and Guaranty Company; and
the counterclaims of Nello L. Teer Company and the United States Fidelity and Guaranty Company, Defendants.

in case No. 191-62-M-Civil.

The two causes were consolidated for trial and all other proceedings; trial by jury was not demanded upon any issues in either cause by any of the parties. The Court, having heard and considered the testimony and evidence of the respective parties, now makes the following findings of fact and conclusions of law, pursuant to rule 52 (a).

FINDINGS OF FACT

1. Nello L. Teer Co. (hereinafter called **TEER**), Plaintiff in No. 10,892, is a Delaware corporation with its principal place of business and principal offices at Durham, North Carolina.

2. Hollywood Golf Estates, Inc., Defendant, (hereinafter called **ESTATES**) is a Florida corporation with its principal place of business in Hollywood, Florida.

3. United States Fidelity & Guaranty Company (hereinafter called **USF&G**), surety for Nello L. Teer Co., is a Maryland corporation with its principal place of business in Baltimore, Maryland.

4. The City of Hollywood (hereinafter called **CITY**

Plaintiff in No. 191-62-M-Civil, is a municipal corporation organized under the laws of the State of Florida.

5. The amount in controversy in each cause exceeds $10,000, exclusive of interest and costs.

6. About December 30, 1959, Plaintiff, **TEER**, a Delaware corporation, as contractor, entered into a contract (Exhibit A attached to **TEER'S** amended complaint) with Defendant, **ESTATES**, a Florida corporation as owner, which contract was supplemented by an addendum contained in a letter dated December 30, 1959 (Exhibit B attached to Teer's amended complaint). Exhibit A and Exhibit B comprise the entire contract between the parties.

7. Pursuant to said contract, **TEER**, as principal, and **USF&G**, as surety, executed and delivered to Defendant a performance bond in the penal sum of $500,000.00, $350,000.00 of which was prorated for the benefit of **ESTATES**, and $150,000.00 of which was prorated for the benefit of **CITY**, said bond being Exhibit B attached to **ESTATES's** crossclaim.

8. At all times prior to and at the time of the execution and delivery of the contract described in Finding #6, **TEER** and **ESTATES** were dealing at arms length, and no fiduciary or confidential relation existed at any time between **TEER** and **ESTATES** and their respective agents with respect to the making of said contract. Before the contract was executed and delivered, **ESTATES** and its agents expressly informed **TEER** and its agents that **ESTATES** knew nothing about "easy digging" or "hard digging" or other problems with regard to dredg-

ing and filling operations, and that such matters were things which **TEER** and its agents must determine for itself.

9. The contract, consisting of Exhibits A and B, was executed and delivered on or about December 30, 1959, but **TEER** did not commence performance under said contract until the 8th day of August, 1960, when the dredging and filling operation actually began; **TEER** ceased performance of said contract on July 13, 1961, and did not subsequently resume operations. During the dredging and filling operations **TEER** dredged and deposited 275,926 cubic yards of fill upon the land described in the contract.

10. At all times material to this suit, **TEER** held itself and its agents out as duly qualified to perform the work required by the contract, and the knowledge, concerning such work and any difficulties likely to be encountered during its prosecution, possessed by **TEER** and its agents far exceeded any such knowledge possessed by **ESTATES** and its agents. **TEER** did not, in the execution of said contract, rely upon any statement of **ESTATES** and its agents concerning "easy digging", "hard digging", or any other difficulties which might be encountered by **TEER** in carrying out the contract.

11. Before the contract was executed and delivered **TEER** and its agents had an opportunity to obtain full, complete and exact information, and actually made an investigation, concerning the nature of the areas where dredging was to be performed.

12. **TEER** was not induced to enter into the con-

tract because of any false or fraudulent representations, or by concealment of material facts, by **ESTATES** or its agents.

13. The contract between **TEER** and **ESTATES** was in all respects a valid and subsisting contract.

14. **ESTATES** in all respects complied with all of the terms of the contract, and fully performed same insofar as required.

15. **TEER** without cause breached the contract by abandoning performance on July 13, 1961, and thereby became liable to **ESTATES** for all damages sustained by **ESTATES** as the proximate result of said breach.

16. All of the material encountered in place by **TEER** in its dredging was "hard rock."

17. $50,000 had been loaned to **TEER** to finance the purchase of the dredge, **ALICE LORRAINE**, to be repaid at the rate of 4 cents per cubic yard, as stated in the contract, of which the sum of $10,092.24 was repaid; the amount of fill delivered by **TEER** but still unpaid is $10,160.90.

18. **TEER** is indebted to **ESTATES** for money lent in the sum of $29,746.86, together with interest thereon at the rate of 6% per annum from July 13, 1961 to the date hereof.

19. After the breach of the contract found above, **ESTATES** entered into a contract with one Arundel Corporation to complete the dredging and filling which **TEER**

had undertaken by its contract to perform at a unit price of forty-five cents per cubic yard. **ESTATES** incurred an expense in the sum of sixty-two and one-half cents per cubic yard for all fill, after subsidence, deposited on its land to complete the dredging and filling which **TEER** had contracted to perform. This is 17.5 cents per cubic yard in excess of the unit price fixed by **TEER's** contract. **ESTATES** is therefore entitled to recover from **TEER**, as principal, and **USF&G**, as surety, the sum of $170,461.20 with interest thereon at 6% per annum from July 13, 1961 to the date hereof.

21. The **CITY OF HOLLYWOOD**, Florida, owns the lake bottom of both North and South Lake referred to in this case.

22. **TEER** knew that **CITY** would allow it to take fill material from the bottom of North and South Lake without limitation as to quantity, in return for and providing that North Lake was excavated to a certain depth and area.

23. **TEER** started dredging under its contract with **ESTATES** about August 8, 1960, and moved into South Lake about November 15, 1960. At this point **CITY**, before it would permit material to be dredged out of South Lake, demanded a bond from **TEER**, running to the benefit of **CITY**, with a specific endorsement that **TEER** would comply with the letters of November 3, 1960, and November 14, 1960, as will appear from A. C. Paoli's letter, as City Attorney, dated November 17, 1960, all incorporated in and made part of the bond by endorsement thereon.

24. Before dredging in North Lake started, but after South Lake had been dredged and fill material taken from it in part performance of **TEER's** contract with **ESTATES**, the minimum requirements for dredging in North Lake were modified slightly as to depth and area. **CITY** required less material to be dredged to meet its minimum requirements than originally required though **TEER** could have dredged additional material to any amounts it wanted, in addition to the minimum required, in order to perform under its contract with **ESTATES**.

25. **TEER** knew that the modifications referred to above, were being made, consented to them, and started dredging under **CITY'S** modified requirements referred to above, expressly agreeing that the modification in "no way avoids the bond or rescinds our bond in any manner or otherwise". This was approved by the bonding company.

26. There still remains 151,000 cubic yards of material to be dredged to meet **CITY's** minimum requirement agreed to by **TEER** before it was allowed to dredge in North and South Lake.

27. The reasonable cost of having 151,000 cubic yards of material dredged from the bottom of North Lake is $135,900.00.

28. **CITY** had nothing to do with the negotiations, or the execution of the contract between **TEER** and **ESTATES**.

29. **CITY** has not shown any damage since it could obtain, for fill delivered and in place, the same price per cubic yard that it would cost to have it removed.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and subject matter of each of these causes of action under 28 U.S.C. 1332.

2. In No. 16-892-M-Civil **TEER** has failed to prove the material allegations of its amended complaint for rescission of the contract, and on this cause of action **ESTATES** is entitled to prevail.

3. Counterdefendant **TEER**, as principal, and cross-defendant **USF&G**, as surety, are liable to **ESTATES**, as obligee, upon the performance bond in the counterclaim and cross-claim against them respectively by reason of **TEER**'s breach of its contract with **ESTATES**, in the amount of $170,461.20 with interest thereon at 6% per annum from July 13, 1961, to date.

4. **TEER** is liable to **ESTATES** for money lent in the amount of $29,746.86 with interest thereon from July 13, 1961.

5. In No. 191-62-M-Civil Plaintiff, **CITY**, although entitled to recover from **TEER**, as principal, and **USF&G**, as surety, for any damages suffered as a result of **TEER**'s failure to perform its contract with **ESTATES**, has failed to prove that it sustained any damage within the meaning of the bond.

6. Counterclaimants **TEER** and **USF&G** have failed to show themselves entitled to rescission of the obligations involved in their respective counterclaims, and counter-

defendant, **CITY**, is entitled to a judgment of dismissal on the counterclaim.

Defendant, **ESTATES**, in case No. 10,892-M-Civil, and Plaintiff, **CITY**, in case No. 191-62-M-Civil, will submit judgments in their respective cases within five days of receipt of a copy of these Conclusions.

Dated at Miami, Florida, this 25th day of September, 1962.

S DAVID W. DYER
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on April 1964, I mailed a copy of the foregoing Brief of Respondent to Carey, Goodman, Terry, Dwyer, and Austin, 650 Seybold Building, Miami, Florida, and to Charles B. Nye, 314 Trust Building, Durham, North Carolina, Attorneys for Petitioners.

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